

APR 17 2006

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

**CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS**

FOR THE NINTH CIRCUIT

LARRY D. RUSSELL,

Plaintiff - Appellant,

v.

STATE OF OREGON; et al.,

Defendants - Appellees.

No. 05-35288

D.C. No. CV-04-03064-JPC

MEMORANDUM^{*}

Appeal from the United States District Court
for the District of Oregon
John P. Cooney, Magistrate Judge, Presiding

Submitted April 5, 2006^{**}

Before: HAWKINS, McKEOWN, and PAEZ, Circuit Judges.

Larry D. Russell appeals pro se from the district court's order dismissing his action alleging violations of the Fifth and Fourteenth Amendment of the Constitution. We have jurisdiction under 28 U.S.C. § 1291. We review for abuse

^{*} This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

^{**} The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

of discretion a district court's dismissal of an action with prejudice for failure to comply with a court's pretrial order. *See Thompson v. Housing Authority of City of Los Angeles*, 782 F.2d 829, 831-32 (9th Cir. 1986). We affirm in part, vacate in part, and remand.

The district court did not abuse its discretion by dismissing Russell's action for failing to file a pretrial order as there is no evidence in the record that the judge was aware that Russell was unable to locate Local Rule 16.6. *See United States v. Elias*, 921 F.3d 870, 874 (9th Cir. 1990) (holding facts not presented to the district court are not part of the record on appeal). The case should not have been dismissed with prejudice, however, as Russell was not given adequate warning that the failure to file the order would result in the permanent bar of his claim. *See United States v. Nat'l Medical Enterprises, Inc.*, 792 F.2d 906, 912-13 (9th Cir. 1986) (holding failure to warn may be a ground for reversing an order of dismissal with prejudice). The case should have been dismissed without prejudice and is therefore vacated and remanded for entry of dismissal without prejudice.

The parties shall bear their own costs on appeal.

AFFIRMED in part; VACATED in part and REMANDED.